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# Dean Allen and Gifford Allen v. Radium King Mines, Inc. : Brief of Appellants

Utah Supreme Court

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# IN THE SUPREME COURT

# of the

# STATE OF UTAH

FILED
MAR 29 1960
Clerk, Supreme Court, Utah

DEAN ALLEN, and

GIFFORD ALLEN,

Plaintiff and Appellants

-v-

RADIUM KING MINES, INC., a Colorado Corporation; ULA URANIUM, INC., a Colorado Corporation, et al.,

Defendants and Respondents

Case No. 9194

## APPELLANTS' BRIEF

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## APPELLANTS' BRIEF

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## PRELIMINARY STATEMENT

Although not apparent from the findings or judgment of the lower court, this case is an eviction case. The parties are aligned as in the trial court and will be referred to as plaintiffs and defendants or by name. The transcript of proceedings at the trial will be referred to as (Tr . . . ).

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The area in question is in Red Canyon of the White Canyon Mining District and it is desirable because of its possibilities for uranium.

Plaintiffs, the Allen brothers, were in actual possession of the contested ground, had completed arrangements for having it drilled, and were about to conduct drilling operations to outline the presence of ore when defendant corporations moved in and threatened the Allens with force and violence if they persisted in their efforts to develop and drill the property. Rather than resort to a contest by force the Allens went to court and brought this case, asking the trial court and now asking this Court to enforce their right to be restored to possession of the property.

The findings of fact and conclusion of law do not reflect this situation and would on their face indicate that this is nothing more than a contest between conflicting mining claims.

With two exceptions the so-called findings of fact are not findings of fact but are merely conclusions and furnish no support or basis for the formal conclusions of law that defendants' claims were valid and plaintiffs' claims invalid. The only two facts found by the court (other than formal recitals of matters of record) are Findings No. 13 and No. 14 to the effect that one notice of location was without signatures and that the boundaries of plaintiffs' claims "were not" marked on the ground so that they could be readily traced.

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## STATEMENT OF FACTS

The contested area is in a section where the towering Wingate cliifs, about 350 feet in height, are the outstanding features of the extremely rough topography. The contested area in this case lies partly on the mesa above the Wingate formation and extends over the cliff and into the canyon below, a difference in elevation of approximately 750 feet. Photographs are in the record which show the general nature of the terrain in question (def. ex. 5, 6, 7, 8 and 9).

The claims relied on by defendants are amended Fat Dog Claims 3, 4 and 5 and purported Fat Dog Claim No. 6 and Fractions 1, 2 and 3. The claims located by plaintiff are Hi Boy No. 1, 2 and 3.

In 1954 one Franzen and wife set out some corners and monuments and filed location notices for Fat Dog Claims Nos. 1-7, inclusive. As now shown on the maps (Ex. RK2) the long dimension of Fat Dog Claims is northwest and southeast. As the notices of location show (Ex. RK3) Franzen intended to locate five Fat Dog Claims in a row, having common side lines. As shown on the map the numbers of the claims were from left to right. Claims No. 6 and 7 were behind or above the first row of claims. Claim No. 6 adjoined No. 1 with which it had a common end line. Claim No. 7 adjoined No. 2 with which it likewise had a common end line. Claims No. 6 and No. 7 had a common side line and this was the extension of the common side line between Claims 1 and 2.

The discovery mouments and the corners along the front or lower ends of Fat Dog Claims 1-5 are on the steep

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slope below the Wingate Cliff. As shown on the map (Ex. RK2) the claims were supposed to extend up over the Wingate cliff onto the Mesa above. The only person who ever saw these corners, as described by Mr. Franzen, was Franzen himself (Tr. 317). They were never seen by anyone else, and where they were placed is entirely unknown at this time (Tr 328,363). It was Mr. Franzen's testimony that he set the back corners of the Fat Dog Claims 1-5 on top of the Wingate cliff all in a few hours, (Tr. 317, 322) and on the same day, whereas his Notices of Location (Ex. RK3) state that his locations were made on three separate days. As already mentoined, Franzen's acts took place in 1954.

In February of 1956 the Allen Brothers laid out their Hi Boy Claims 1, 2 and 3. Their location monuments for these claims were on top and at the edge of the Wingate Cliff (Tr 19, 20). The Hi Boy location monuments were intended to be at the center of each claim with the claim extending back onto the Mesa and also in the opposite direction down the cliff and into the Canyon some 800 feet below (Pl. Ex. Def; Tr. 137).

After setting the location monuments the Allen Brothers set out their corner monuments on top of the Mesa (Tr. 21). The Allen Brothers then went down into the canyon and set out the lower corners and end centers of Hi Boy Claims 1, 2 and 3 (Tr. 23-24).

In May of 1956 the defendants sent a surveyor to the area in question with instructions to survey and mark

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out the Fat Dog Mining Claims. There were to be six claims in one row and one in the second row (Tr. 294). It will be recalled that Franzen had five claims in the front row and two in the second. This surveyor was Mr. Shepherd, whose testimony appears at pages 258-305 of the transcript.

Mr. Shepherd surveyed and marked the corners of these claims as instructed. He found the front corners of the original five Fat Dog Claims (Tr. 259-269). He marked out an additional claim adjoining No. 5 and called that No. 6 (Tr. 297), and he put one claim in the second row joining onto the end line of No. 1 calling that No. 7 (Tr. 297). As surveyed by Mr. Shepherd there were gaps between the claims so he erected discovery monuments and called these Fractions 1, 2 and 3 (Tr. 297).

Mr. Shpherd is a surveyor not a miner (Tr. 258). He was not looking for minerals, he was simply making a survey (Tr. 260). He never found any corners or monuments for Fat Dogs on top of the Wingate (Tr. 271, 287) or anywhere else except the front corners and the monuments along the front row (Tr. 288). He surveyed and placed corners and markers for all these claims without reference to any monuments on top of Wingate and without reference to whether or not the territory laid out by him embraced the same ground as that laid out by Franzen (Tr.294). Mr. Shepherd laid these claims out in accordance with a sketch supplied him by defendant corporation Radium King (Tr. 295). Mr. Shepherd then wrote up the amended location notices which defendants introduced as their Exhibit RK4. This surveying work of Mr. Shepherd constitutes the

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locations and claims on which defendant corporations rely.

In March or April 1957, commencing with air born scintillation surveys (Tr. 102-105) the plaintiffs instituted activities calculated to establish or determine the course of the channels and the character of the uranium ore body on this ground and to proceed with the development of the Hi Boy Claims (Tr. 35, 36, 144, 145). They continued by making arrangements with other people for the necessary money (Tr. 35), they made arrangements for drilling (Tr. 146), for road building and for surveying (Tr. 145). Engineers went over the ground with instrumets and determined the proper drill sites (Tr. 147). Arrangements were made for a right of way through the property of others (Tr. 145). All this is detailed in the transcript at page 35-38, 145-147. When arrangements were all complete a buldozer was brought to the Allen camp near the property, and road-building operations were started (Tr. 37, 38).

This touched off a sudden spurt of activity by the Radium King people (Tr. 382) who had a mine and were conducting operations on other property, but to that time had no person on or near the property in dispute (Tr. 381).

Defendants started pushing a road to the property in question (Tr. 39). They contacted the drillers whom the plaintiffs had engaged and hired them away (Tr. 413). This was all under the control and direction of defendants' Dr. Flint, who was so anxious to forestall plaintiffs that he made trips by airplane in order to expedite arrangements to exclude plaintiffs from the property.

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The plaintiffs persisted in their efforts and pushed construction of the road (Tr. 43). Finally defendants by warnings and by threatening to roll down rocks or boulders which would ruin the Allen equipment, ran the Allen operator off the area and excluded the Allen people from the contested ground (Tr. 40-42). That the Allen people were run out, that the defendants were prepared to use force and so informed the plaintiffs, that the defendants would have used force if necessary is all conceded and is undisputed (Tr. 378).

This case was then instituted by the plaintiffs in order to regain by orderly process of law the possession which defendants had taken from them by show of superior force and threat of violence.

## STATEMENT OF POINTS

**POINT I. The Court Will Protect the Plaintiffs in Their Lawful and Peaceable Possession of the Premises.**

**POINT II. Plaintiffs' Hi Boy Claims are Valid and are Superior to any Claims of Defendants.**

A. Finding No. 14 is Erroneous, since the boundaries of Hi Boy Claims 1, 2 and 3 were adequately marked and complied with all requirements of Law.

B. Finding No. 13 does not support the conclusion that notice of location for Hi Boy 1 Claim was invalid

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**POINT III. The Fat Dog Claims Must be Considered as New Locations and as Void for Want of Discovery.**

QUESTIONS TO BE DECIDED

Since plaintiffs were in possession in which they are entitled to be protected, absent some paramount title, this is not a case where plaintiffs must rely on the strength of their own title rather than on the weakness of their adversarie's title; rather it is a case were the burden is on the adversary to show some property right entitling them to move the plaintiffs out and supplant them in their actual and peaceable possession. Therefore, the question in the case is whether defendants etablished a right superior to plaintiffs' actual and prior possession. To show this right defendants rely exclusively on the Fat Dog filings.

There are two reasons why the Fat Dog filings are insufficient to establish any justification in defendants:

The Hi Boy Claims 1, 2 and 3 are valid and prior in time to any claims which can be asserted by defendants by virtue of the Fat Dog filings.

Defendants, on this record, may rely only on the 1956 Fat Dog Filings which may be treated and considered as new locations or attempted locations and which by all the evidence in the record are shown to be invalid.

**POINT I. The court will protect the plaintiffs in their lawful and peaceable possession of the premises.**

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Plaintiffs' continuous, notorious possession of the property in August of 1957, the month in which they were ousted, and in the month preceding is shown in detail in the record and cannot be questioned (Tr. 35, 36, 37, 38, 145, 146, 147, 175). It is likewise undisputed that no personnel of defendant corporations were on or near the premises until defendants instituted measures for the forcible removal of plaintiffs (Tr. 381).

The only contrary argument advanced by defendants to dispute plaintiffs' actual possession was that plaintiffs' camp was not actually within the boundaries of the disputed ground. The decisions do not require that a miner who is diligently and in good faith attempting to develop a location need stay on the property twenty-four hours a day in order to be considered in actual possession. But this all that defendants' argument amounts to.

Under all the authorities it is clear that plaintiffs' possession gave them rights they are entitled to enforce in this action and which rights will prevail over defendants except to the extent they show ownership of a valid mining claim or claims.

**Atherly v. Bullion Monarch Uranium Company,** 8 Utah 2d 362, 335 P. 2d 71, points out that since territorial days it has been the law in Utah that one may not locate ground on which another is in actual possession under claim and color of right, citing **Eilers v. Boatman,** 3 tUah 159, 167, 2 P. 66, 72, affirmed 111 U. S. 356, 357, 4 S. Ct. 432, 28 L. Ed. 454.

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This rule is recognized by recent cases everywhere. See for instance:

Kanab Uranium Corp. v. Consolidated Uranium Mines, 227 F. 2d 434 (10 Cir. Affirmed Utah Dist. Ct.).

Adams v. Benedict, 64 N. M. 234, 327 P. 2d 308.

Inman v. Ollson (Ore.) 321 P. 2d 1043.

**POINT II. Plaintiffs' Hi Boy Claims are valid and are superior to any claims of defendants.**

The Hi Boy filings and locations were subsequent in time to Franzen's original Fat Dogs but prior in time to the so-called amended Fat Dog Claims and Fractions made by the surveyor Shepherd on defendants' behalf.

Plaintiffs introduced evidence to establish all of the elements necessary for valid mining locations. Apparently the court was satisfied as to the adequacy of this evidence except on two specicif points. We do not feel that any of the elements other than the two specifically treated by the trial court can be successfully challenged and hence will lengthen this brief by discussion of them.

**A. Finding No. 14 is Erroneous, Since the Boundaries of Hi Boy Claims 1, 2 and 3 Were Adequately Marked and Complied with all Requirements of Law.**

Finding No. 14 of the court is erroneous and unsupported; it is contrary to all of the evidence. In this finding the lower court stated that the boundaries of the Hi Boy

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Claims were not distinctly marked on the ground so that the boundaries could be readily traced. All that the law requires is that discovery monuments and corner monuments be erected. The Allens went farther than this and added end center monuments as well as erecting corner monuments and discovery monuments (Tr. 21-29). These monuments were placed in February of 1956 by Paul Allen and Dean Allen, both of whom testified. Dean Allen described in detail the maner in which the claims were located and the monuments erected. This appears in the transcript at pages 17-33.

George H. Newell, a licensed and qualified surveyor, surveyed these claims and visited the premises in December of 1958 and in January of 1959 (Tr. 116). Paul Allen was with him and pointed out the various corners and monuments which had been erected in 1956. All the monuments were in the same spots where they had originally been erected; nothing had been moved (Tr. 254).

Newell testified that in his professional opinion these monuments showed the claims as originally laid out (Tr. 151). There is absolutely no evidence by any person that any of these boundary monuments were at any time in any position other than those in which they were found by this surveyor Newell. In fact, there was no serious contention or effort at the trial to produce any witness who did so testify. The effort which the defendants did make was directed to the discovery monuments. In our opinion the trial court did not intend by its findings to imply that the original monuments were in any way moved or in any

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way inadequate. It was asked to find the monuments "were floated" but it refused to do so.

Defendants may argue that the boundaries could not be readily traced because plaintiffs themselves did not know what ground was embraced until the survey. That is always true. No one knows what ground is in his claim until he surveys it, particularly if there is no point from which all the corners are visible at the same time.

The lower court's finding as to the boundaries was apparently in response to the section of the brief filed by defendants where defendants dwelt at length upon a number of monuments which were later found in this area and were labeled as corners of various Hi Boy Claims.

These additional markings were not location monuments or monuments erected in connection with location but were merely proposed positions which a surveyor by the name of Morrell advised in connection with a proposal of his to straighten the Hi Boy Claims (Tr. 186). This survey was never completed and the proposals, as made by Morrell, were never accepted by the plaintiffs (Tr. 188-191, 216-227). Undoubtedly Morrell did mess things up and that is why plaintiffs dispensed with his services and engaged Mr. Newell.

When the claims were originally laid out they were laid out adequately and properly. They were valid at that time and they were not rendered invalid by the abortive efforts of Morrell or by the preliminary measures he took with the intention of surveying the claims.

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When the claims were properly and adequately surveyed by Newell ther were established as L-Shaped (Pltfs. E. C). It will be recalled that the ocators of the Hi Boy Claims first erected the location monuments, then they set up their corners and end center monuments on the high ground behind the Wingate Cliff. After that they went down into the canyon and set their other corners and center monuments (Tr. 21-29). They intended to get these in line with the discovery monuments and end corners on top of the cliff but they could only estimate the proper positions since from the lower level they could see neither the location monuments nor the end corners (Tr. 27). Any variation from perfect is bound to produce an L-shaped claim under these circumstances.

The only evidence on this point is by the expert witness Newell who says that under these circumstances an L-shaped claim is bound to result unless the locator is armed with a surveying instrument such as a Brunton compass (Tr. 169). The defendants agreed that this was correct (Tr. 170).

The boundaries of the Hi Boy Claims are shown by all the evidence to be proper and adequate and the finding of the Court that they were not is the result of mistake and a misapprehension of the law.

**B. Finding No. 13 Does Not Support the Conclusion that Notice of Location for Hi Boy 1 Claim was Invalid.**

The court's finding No. 13 that the original notice of location for Hi Boy Claim 1 did not contain the name of the

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locator does not support the conclusion that the notice was therefore invalid. Defendants learned that the locator's name in the papers on Hi Boy Claim 1 was missing or had been obliterated only after they had acted to throw plaintiffs off the premises. They already knew where the location was on the basis of recorded notice available to them from the court house. They already knew from their talks with Gifford Allen who the locators were, and there was no showing below that the name was not on the claim at the time it was put in the discovery monument.

Fuller v. Mountain Sculpture, 6 Utah 2d 385, 314 P. 2d 842.

Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P. 2d 503.

**POINT III. The Fat Dog Claims must be considered as new locations and as void for want of discovery.**

As originally laid out by Franzen, Fat Dog 6 adjoined Fat Dog No. 1. As "amended" by surveyor Shepherd, Fat Dog 6 lies alongside of No. 5, and is about two thousand feet from No. 1.

Shepherd had no information as to how the original Fat Dog Claims were aligned. The so-called "amended" claims cannot relate back to the originals because they are not shown to embrace the same ground. The fractions obviously cannot be related to anything.

Morrison v. Regan, 8 Ida. 291, 67 Pac. 955, 961.

Morrison's Mining Rights (16th Ed.), at p. 160.

58 C. J. S. Mines and Minerals, Sec. 53 at p. 107.

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Hence the amended Fat Dogs and fractions are new locations, made by a surveyor at the request of Radium King, according to a Radium King sketch and without regard to Franzen's claims. These new locations were not responsive to any discovery or related to any discovery.

The locator was a surveyor and he was surveying, not looking for or concerned with indications of ore, mineralization or any of the factors required for a discovery under **Rummel v. Bailey**, 7 Utah 2d 137, 320 P. 2d 653.

He simply laid out an area, divided it into strips which would yield the maxmum dimensions allowed by the mining laws, then designated the gaps as "fractions," and decorated them with so-called discovery monuments, not because he had discovered anything but because claims should have discovery monuments.

Number 6 was laid out by Shepherd under the impression that Franzen had staked a claim there, whereas Franzen actually had not done so. If this resulted in a valid location then we have a new type of discovery, discovery by accident.

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## CONCLUSION

Plaintiffs in the midst of diligent effort to develop their mining claims were admittedly ousted and prevented from doing so by the defendant corporations. The lower court in an obvious misapprehension of the law and of the application of the law to the undisputed evidence has deprived plaintiffs of their possession, has held their claims invalid for an untenable reason, and has sustained as valid claims which rate high in neatness and as examples of good surveying but which are totally lacking in the requirements of proper mining claims.

The judgment should be reversed and the lower court directed to grant a new trial or to enter judgment in favor of the plaintiffs.

Respectfully submitted,

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